86-2059

No. .....

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1986

SHERIFF, FALL RIVER COUNTY JAIL,
and
JEFF TARELL – JAILER OF FALL RIVER COUNTY JAIL,

Appellants,

v.

STANLEY L. HUGHES,

Appellee.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

JURISDICTIONAL STATEMENT

DAVENPORT, EVANS,
HURWITZ & SMITH
ELLSWORTH E. EVANS*
MICHAEL J. SCHAFFER
TIMOTHY M. GEBHART
513 South Main
P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorneys for Appellants
**Counsel of Record*
(605) 336-2880

QUESTIONS PRESENTED

1. Does a South Dakota tolling provision for imprisonment that expressly does not apply to federal civil rights cases, thus making those cases subject to the same three-year statute of limitations applicable to unincarcerated persons, violate the Equal Protection Clause?

2. Is a state statute that exempts federal civil rights cases from the tolling provisions for imprisonment inconsistent with federal law?

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ON APPEAL FROM THE UNITED STATES
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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The panel opinion of the United States Court of Appeals for the Eighth Circuit is officially reported at 814 F.2d 532 and is reprinted in the Appendix at A-1 through A-7 . The opinion of the United States District Court for the District of South Dakota, Western Division, granting Appellants' motion for summary judgment is not reported. It is reprinted in the Appendix at A-8 through A-11 .

JURISDICTION

This action under 42 U.S.C. § 1983 draws into question the validity of S.D. Codified Laws § 15-2-22 (1984). The statute tolls statutes of limitations for persons imprisoned on a criminal charge or a sentence of less than life when a cause of action accrued but exempts federal civil rights cases from its application.

The United States District Court for the District of South Dakota, the Honorable Richard H. Battey presiding, assumed jurisdiction pursuant to 28 U.S.C. § 1343(3). On June 26, 1986, Judge Battey held that the provisions of S.D. Codified Laws § 15-2-22 applied to Appellee's action and, as a result, the action was barred by the statute of limitations. Judge Battey granted Appellants' motion for summary judgment and ordered Appellee's case dismissed. The order was entered on June 26, 1986.

Appellee filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit on July 28, 1986, invoking the court's jurisdiction under 28 U.S.C. § 1291. On March 24, 1987, the Court of Appeals rendered an opinion and entered judgment reversing the District Court. It held that the portion of S.D. Codified Laws § 15-2-22 exempting prisoner federal civil cases from its operation and effect was inconsistent with federal law and discriminated against federal rights. Notice of Appeal to this Court was filed June 8, 1987.

The jurisdiction of the United States Supreme Court to review the decision of the Court of Appeals on appeal is conferred by 28 U.S.C. § 1254(2).[1]

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[1]In the alternative, Appellants request the Supreme Court to entertain this Jurisdictional Statement as a Petition for Writ of Certiorari pursuant to 28 U.S.C. § 1254(1). *See Burger King Corp. v. Rudzewicz*, 417 U.S. 462 (1985).

Because the proceeding draws into question the constitutionality of a statute of the State of South Dakota, namely, S.D. Codified Laws § 15-2-22, and neither the State of South Dakota nor any agency, officer, or employee of the State of South Dakota is a party, it is noted that 28 U.S.C. §2403(b) may be applicable. This proceeding originated in a court of the United States as defined by 28 U.S.C. § 451, namely, the United States District Court for the District of South Dakota, and no court of the United States has certified to the Attorney General of the State of South Dakota the fact that the constitutionality of S.D. Codified Laws § 15-2-22 was drawn into question.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Section 1 of the Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No state shall make or enforce any law which shall ... deny to any person within its jurisdiction the equal protection of the laws.

Section 15-2-22 of the South Dakota Codified Laws provides:

> If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture, or against a sheriff or other officer for an escape, be at the time the cause of action accrued, either:
>
> (1) Within the age of minority as defined in chapter 26-1;
>
> (2) Mentally ill; or
>
> (3) Imprisoned on a criminal charge; or in execution under the sentence of a criminal court for a term less than his natural life;
>
> the time of such disability is not a part of the time limited for the commencement of the action.
>
> The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.

The provisions of this section shall not apply to actions for the foreclosure of any real estate mortgage, by action by advertisement.

The provisions of subdivision (3) do not apply to federal civil rights cases.

STATEMENT OF THE CASE

In late summer 1982, Stanley L. Hughes (hereafter "Plaintiff") was arrested and incarcerated in the Fall River County Jail, in Hot Springs, South Dakota. Plaintiff claims that he was raped by another prisoner at the jail on September 9, 10 and 11, 1982. Plaintiff claims that despite reporting the first and second alleged rapes to jailer Jeff Tarell, Tarell kept him in the same cell with the purported rapist. No alleged rapes occurred after those dates and Plaintiff had no other complaints about his treatment at the jail.

In the spring of 1983 Plaintiff was convicted on two counts of raping an eight-year-old boy. He began serving his sentence in the South Dakota State Penitentiary in April 1983. Plaintiff remains incarcerated in the Penitentiary.

On January 14, 1986, Plaintiff filed a *pro se* complaint in United States District Court for the District of South Dakota, Western Division. The complaint, based upon 42 U.S.C. § 1983, sought $5 million in damages, alleging Plaintiff became diseased with venereal warts as a result of the alleged rapes three and a half years prior. Tarell and the Sheriff of Fall River County were named as Defendants.

Plaintiff admits nothing prevented him from bringing his civil rights action earlier and that he could have brought it any time after September 1982. In fact, Plaintiff brought the action only after he learned the result of another civil rights lawsuit brought by a prison inmate against the South Dakota State Penitentiary.

South Dakota has a three-year statute of limitations for personal injury actions. S.D. Codified Laws § 15-2-14 (1984). When Plaintiff brought his action, South Dakota had a two-year statute of limitations for federal civil rights actions. S.D. Codified Laws § 15-2-15.2 (1984).[2] Another statute, S.D. Codified Laws § 15-2-22(3) (1984), tolls statutes of limitations for persons imprisoned on a criminal charge or a sentence of less than life. The statute does not apply to federal civil rights actions.

After taking Plaintiff's deposition, Defendants moved for a summary judgment on the basis that the action was barred by the statute of limitations. Plaintiff, represented by counsel appointed by the District Court, argued that the tolling provision of the S.D. Codified Laws § 15-2-22(3) applied, making his action timely. Plaintiff asserted that the exemption of federal civil rights cases from that portion of the tolling statute could not bar his action because it discriminates against civil rights claims and is inconsistent with federal policy.

The District Court held that the statute was not inconsistent with the federal Constitution or federal law. The Court applied the statute and granted summary judgment in Defendants' favor, holding the action was barred by South Dakota's three year personal injury statute of limitations.

On July 28, 1986, Plaintiff's counsel filed a Notice of Appeal with the United States Court of Appeals for the Eighth Circuit.

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[2]Effective July 1, 1986, this statute was amended to create a three year limitations period for federal civil rights actions. 1986 S.D. Sess. Laws ch. 185, *codified at* S.D. Codified Laws § 15-2-15.2 (1987 Supp.). By its terms, the amendment was prospective only. That neither affects nor is an issue in this case. In light of *Wilson v. Garcia*, 471 U.S. 261 (1985), the District Court applied the personal injury statute of limitations, not the two-year statute then existing under S.D. Codified Laws § 15-2-15.2.

The issue posed in the Notice of Appeal and Statement of Issues was whether S.D. Codified Laws § 15-2-22 was inconsistent with federal policy. The Court of Appeals appointed the same counsel to represent Plaintiff and to brief the question of whether the civil rights exception of S.D. Codified Laws § 15-2-22 violated equal protection. In his appellate briefs, Plaintiff's counsel argued that South Dakota's tolling exception is inconsistent with federal law and policy and unconstitutionally discriminates against and is hostile to federal causes of action.

The Court of Appeals reversed the District Court. It said Plaintiff's action was tolled under S.D. Codified Laws § 15-2-22 because the civil rights provision discriminated against federal rights and thus was inconsistent with federal law. In so holding, the Court relied upon an earlier decision holding a state's shorter statute of limitations for federal statutory claims violative of the Supremacy Clause and the Equal Protection Clause of the Fourteenth Amendment. *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam without opinion*, 327 U.S. 757 (1946).[3]

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I.

Congress did not establish a statute of limitations or create tolling rules governing actions brought under 42 U.S.C. § 1983. Section 1988, however, directs that where no federal law exists

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[3]While the Court of Appeals did not expressly say that the civil rights provision of S.D. Codified Laws § 15-2-22 is unconstitutional, that is is the clear import of its citation of *Republic Pictures*. Moreover, it necessarily follows from the Court of Appeals' holding that the statute is invalid under either the Supremacy Clause or the Fourteenth Amendment, giving this Court jurisdiction on direct appeal. *Cf. Franchise Tax Board v. United States Postal Service*, 467 U.S. 512, 515 n. 7 (1984).

> the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction . . . is held, so far as the same is not inconsistent with the Constitution and the laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause[.]

As a result, this Court has held that state personal injury statutes of limitations and tolling rules apply to Section 1983 actions. *Wilson v. Garcia*, 471 U.S. 261 (1985); *Board of Regents v. Tomanio*, 446 U.S. 478 (1980). Federal courts can disregard state tolling rules only if they are "inconsistent with the Constitution and laws of the United States." *Tomanio*, 446 U.S. at 483-85.

Statutes of limitations are not mere legal technicalities; they are a fundamental part of a well-ordered judicial system. *Id.* at 487. Tolling provisions are an integral part of and inextricably related to statutes of limitations. *Id.* at 485-86, 488; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 464 (1975). Moreover, state policies or repose are not disfavored in federal law. *Id.* at 488. Thus, the question is not whether S.D. Codified Laws § 15-2-22 should be looked to; it is whether the statute is inconsistent with federal law or the Constitution.

The Equal Protection Clause is essentially a directive that all persons similarly situated should be treated alike. *Plyler v. Doe*, 457 U.S. 202, 215 (1982). The initial discretion to classify what is similar and what is different rests with the legislatures of the various States. *Id.* at 216. Absent a classification that is based upon a suspect class or impinges upon fundamental rights, the determination made by a state legislature and reflected in a state's statutes need only be rationally related to the achievement of legitimate governmental ends. *See, e.g., G.D. Searle & Co. v. Cohn*, 455 U.S. 404, 408 (1982).

This Court has never recognized prison inmates as a suspect class for Equal Protection analysis. Other courts have expressly said prison inmates are not a suspect class. *See, e.g., Graham v. Bowen*, 648 F. Supp. 298, 301 (S.D. Tex. 1986); *Jones v. Gruneward*, 644 F. Supp. 256, 259 (S.D. N.Y. 1986); *Jackson v.*

Congress of the United States, 558 F. Supp. 1288, 1291 (S.D.N.Y. 1983); *Hicks v. Commonwealth of Virginia*, 397 F. Supp. 401, 402 (W.D. Va. 1975). While prisoners do have a constitutional right of access to the courts, *see, e.g., Bounds v. Smith*, 430 U.S. 817 (1977), South Dakota has erected no barrier to the courts or to the filing of civil rights actions. To the contrary, S.D. Codified Laws § 15-2-22 places prisoner civil rights cases on a par with civil rights claims of ordinary unincarcerated citizens.

Thus, S.D. Codified Laws § 15-2-22 need only meet the rational basis test to survive Equal Protection scrutiny. The limitations period created in part by the statute is long enough to provide a reasonable opportunity for an incarcerated civil rights plaintiff to bring suit. This Court has approved three year statutes of limitations in civil rights actions, *Wilson v. Garcia, supra*, and 42 U.S.C. § 1986 provides a one year statute of limitations. If these limitations periods are permissible, the three year statute of limitations that applies to prisoners in South Dakota cannot violate the Equal Protection Clause.

Important government interests are at stake here. Public entities and state actors are the targets of federal civil rights claims. These individuals and entities are entitled to know at the end of a given period that their exposure and liability is over. Such a cutoff is important from a financial and planning standpoint so that individuals and entities like the sheriff, jailer and county here can adopt budgets and provide insurance for themselves and others to defend against such actions and to pay any awards.

Also, governmental immunity and notice of claim provisions may limit local government liability against state law claims. *See, e.g.*, S.D. Codified Laws § 7-18-6 (1981) (no action may be brought against a county unless the claim is first presented to and acted upon by the board of county commissioners); S.D. Codified Laws § 9-24-2 (1981) (no action for personal injury caused by the negligence of a municipality can be brought absent written notice

of the claim within sixty days after the injury).[4] These provisions, however, would not protect local government against a federal civil rights claim, where the prospect exists for an attorney fee award far in excess of any jury verdict. *See City of Riverside v. Rivera*, 106 S. Ct. 2686 (1986) (upholding attorney fee award of $245,456.25 where jury verdict was $33,350.00).

Moreover, claims such as this one become stale over time. Memories fade, witnesses disappear, and records are lost or destroyed. It is these same policies which provide the rationale for statutes of limitations in the first instance. *See, e.g., Tomanio, supra*, 446 U.S. at 487. Additionally, as explored in detail in Part II, *infra*, the rationale behind prisoner tolling provisions does not comport with the realities of federal civil rights actions.

These policies and concerns constitute a rational basis for the South Dakota Legislature's decision not to provide a tolling provision for imprisonment in federal civil rights actions. Thus, excepting prisoner civil rights actions from the general tolling statute does not violate the Equal Protection Clause. *Cf. Hargett v. Limberg*, 598 F. Supp. 152, 156-58 (D. Utah 1984), *rev'd on other grounds*, 801 F.2d 368 (10th Cir. 1986) (statute excluding minors and incompetent persons with medical malpractice claims from general tolling provision does not violate the Equal Protection Clause).

Nor is S.D. Codified Laws § 15-2-22 inconsistent with federal law. This Court addressed the question of when state laws are inconsistent with federal law in *Robertson v. Wegmann*, 436 U.S. 584 (1978). The Court held that a Louisiana survivorship statute that limited the class of people for whose benefit an action sur-

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[4]These statutes were repealed in 1986 when the South Dakota Legislature created a public entity pool. 1986 S.D. Sess. Laws ch. 4, ch. 413. They were, however, in existence at the time Plaintiff's cause of action accrued. Moreover, even under the new statutory scheme no action can be brought against a public entity or its employees unless written notice of the injury is given with 180 days after the injury. S.D. Codified Laws § 3-21-2 (1987 Supp.).

vived, and which precluded recovery in that case, was not inconsistent with federal law. It said:

> That a federal remedy should be available, however, does not mean that a § 1983 plaintiff (or his representative) must be allowed to continue an action in disregard of the state law to which § 1983 refers us. A state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the § 1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be one favoring the plaintiff, and its source would be essentially irrelevant. But § 1988 quite clearly instructs us to refer to state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

436 U.S. at 593.

Of prime importance in determining whether a state law is inconsistent with federal law is whether application of the law is inconsistent with the federal policies underlying the cause of action. *Id.* at 590 (quoting *Railway Express, supra,* 421 U.S. at 465). Deterrence and compensation are the policies underlying federal civil rights claims. *Id.* at 590-91. The civil rights provision of S.D. Codified Laws § 15-2-22 is not inconsistent with those policies.

Prisoners can still readily enforce their claims, thereby recovering compensation and fostering deterrence, simply by commencing their actions within three years. *Cf. Tomanio, supra,* 446 U.S. at 488. However, refusal to apply South Dakota's provision requiring prisoners to bring their claims within three years of accrual is inconsistent with the policy of deterrence. If an inmate's constitutional rights are violated while incarcerated, there is no deterrent effect in allowing the inmate to sleep on his case for up to eight years. Refusing to apply the provision also is inconsistent with the policy of attempting to limit the exposure of civil rights defendants to claims brought within a reasonable period of time. *See Id.* at 487.

Like the petitioner in *Railway Express*, Plaintiff freely concedes he could have filed his action at any time after his cause of action accrued. 421 U.S. at 466. As in *Railway Express*, Plaintiff slept on his rights and no policy reason exists to excuse his failure to take the steps necessary to present his claim. *Id.*

II.

This appeal also presents an important and substantial question of the extent to which states can modify their codification of common law principles to recognize and respond to the realities of modern society. The Court of Appeals gave short shrift to Defendants' position that the common law doctrines giving rise to prisoner tolling statutes simply do not fit the reality of federal civil rights litigation and the policies underlying it.

The rule tolling statutes of limitation for imprisoned persons stems from the common law concept that such persons are *civiliter mortuus* (civilly dead) and, hence, unable to sue. *See, e.g., Hawthorne v. Wells*, 761 F.2d 1514, 1515 (11th Cir. 1985); *Heard v. Caldwell*, 364 F. Supp. 419, 421 (S.D. Ga. 1973). When prisoners were unable to sue, tolling provisions protected their ability to sue when the disability was removed.

The history of S.D. Codified Laws § 15-2-22 demonstrates it is a codification of common law doctrine. With the exception of the civil rights provision and another dealing with real estate foreclosures, the statute has existed with virtually the same language since before South Dakota became a state. *See* Revised Code of Civil Procedure of the Territory of Dakota § 64 (1877). When South Dakota achieved statehood, the statute became a state law without change. *See* 1890 S.D. Sess. Laws ch. 105; Revised Code of Civil Procedure of South Dakota § 70 (1903).

Today, however, the disability imagined and created by the common law no longer exists. Not only do prisoners have a constitutional right of access to the courts and a constitutional right to adequate legal assistance, including law libraries, they are entitled to have paper, pens, notarial services and even stamps provided to them to bring their actions. *See Bounds v. Smith*, 430 U.S. 817

(1977); *Wolff v. McDonnell*, 418 U.S. 539 (1974). Similarly, prisoners can have counsel appointed to represent them in federal court. *See* 28 U.S.C. § 1915. Nothing prevents prisoners from bringing civil rights actions while incarcerated, as is demonstrated by the fact Plaintiff brought this action, along with a separate petition for a writ of habeas corpus, while in prison. Because all prisoners who suffer constitutional deprivations while incarcerated can, in fact, bring civil rights actions and the statutes at issue deals with actions accruing while in prison or jail, it is inconsistent for the statute of limitations to hinge on the premise that a prisoner is incapable of bringing the action. *Hawthorne*, *supra*, 761 F.2d at 1516.

In 1983, the South Dakota Legislature recognized that the common law underpinnings of the prisoner tolling provision did not comport with the reality of federal civil rights cases. It amended Section 15-2-22 to make the prisoner tolling provision inapplicable to those cases. 1983 S.D. Sess. Laws ch. 155, § 2. The Legislature made a judgment that prisoners' constitutionally guaranteed access to courts and right to legal assistance obliterated the purpose behind prisoner tolling statutes for federal civil rights actions. Recognizing that inmates stand in the same, if not a better, position than ordinary citizens with civil rights claims, the Legislature put those inmates on a par with ordinary citizens.

The civil rights provision of S.D. Codified Laws § 15-2-22 reflects a state legislative determination that the mere fact of incarceration does not disable a person from bringing and pursuing civil rights cases. This determination simply recognizes and responds to the facts of modern society. Moreover, it is the type of decision the States are expected to make in our federalist system. In the language of 42 U.S.C. § 1988, South Dakota has modified and changed the common law by statute. The decision of the Court of Appeals nullifies that determination and forbids the States from making such decisions simply because a federal cause of action forms the basis of a person's lawsuit. The Court of Appeals' decision does not foster federalism when it rejects a rule deliberately chosen by the South Dakota Legislature and supplants it with an *ad hoc* federal rule. *Cf. Tomanio*, *supra*, 466 U.S. at 492.

III.

Finally, since this Court's decision in *Tomanio*, *supra*, the federal courts are in conflict on the applicability of prisoner tolling provisions to federal civil rights actions. Thus, for example, Georgia's prisoner tolling statute applies to federal actions brought by state prisoners against state prison officials, *Turner v. Evans*, 721 F.2d 341 (11th Cir. 1983), but not to actions brought by federal prisoners against federal prison officials. *Hawthorne*, *supra*. Conflict even exists between judges within the same district. *See LaGon v. Barry*, 658 F. Supp. 55 (D.D.C. 1987).

Several courts have held that state prisoner tolling provisions apply to federal civil rights claims. *See, e.g., Marks v. Parra*, 785 F.2d 1419 (9th Cir. 1986); *Bailey v. Faulkner*, 765 F.2d 102 (7th Cir. 1985); *Williams v. Dallas County Commissioners*, 689 F.2d 1212 (5th Cir. 1982), *cert. denied*, 461 U.S. 935 (1983); *Brown v. Bigger*, 622 F.2d 1025 (10th Cir. 1980). Others have held that such statutes are inconsistent with the policies underlying federal civil rights claims. *See, e.g., Hawthorne*, *supra*, (actions by federal prisoners against federal prison officials); *Perotti v. Carty*, 647 F. Supp. 39 (W.D. Ohio 1986); *Vargas v. Jago*, 636 F. Supp. 425 (S.D. Ohio 1986); *Campbell v. Guy*, 520 F. Supp. 53 (E.D. Mich. 1981), *aff'd without opinion*, 711 F.2d 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984).

This Court has recognized that conflict, confusion and uncertainty surrounding statute of limitations questions in civil rights litigation provide compelling reasons for review by the Supreme Court. *Wilson v. Garcia*, *supra*, 471 U.S. 261. Tolling provisions are an integral part of statutes of limitations. The disagreement among the federal courts over the applicability of prisoner tolling statutes breeds conflict, uncertainty and confusion. As a result, this case provides the Court with the opportunity to resolve the substantial question of whether common law-based prisoner tolling rules comport with the modern realities of civil rights litigation and to resolve a continuing and growing conflict among the federal courts.

CONCLUSION

The questions presented by this appeal are substantial and require plenary consideration by this Court for their resolution.

Respectfully submitted,

DAVENPORT, EVANS,
HURWITZ & SMITH
ELLSWORTH E. EVANS
MICHAEL J. SCHAFFER
TIMOTHY M. GEBHART
513 South Main Avenue
P.O. Box 1030
Sioux Falls, SD 57101-1030
Attorneys for Appellants

June 22, 1987

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 86-5296

Stanley L. Hughes,

Appellant,

v.

Sheriff of Fall River County Jail
and Jeff Tarell, Jailer Fall River County Jail

Appellees.

ON APPEAL
FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA.

Submitted: March 11, 1987
Filed: March 24, 1987

Before ARNOLD and FAGG, Circuit Judges,
and LARSON,* Senior District Judge.

ARNOLD, Circuit Judge.

Plaintiff Stanley L. Hughes, a South Dakota State Penitentiary inmate, appeals the District Court's grant of summary judgment to the defendants in this action under 42 U.S.C. § 1983, the Sheriff of Fall River County Jail, and Jeff Tarell, Jailer of the Fall River County Jail. The District Court held that Hughes's action was barred by the applicable statute of limitations. Hughes contends that he is entitled to the benefit of a

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*The Hon. Earl R. Larson, Senior United States District Judge for the District of Minnesota, sitting by designation

South Dakota tolling statute, S.D.C.L. 15-2-22(3), which, with certain restrictions, exempts periods of imprisonment from the time limited for commencing an action. Hughes maintains that the District Court erred in applying a provision of this statute which states that it is inapplicable to federal civil-rights claims, arguing that this provision is inconsistent with federal law. We agree, and therefore reverse.

I.

Hughes was arrested for the crimes for which he is presently imprisoned late in the summer of 1982, and was incarcerated in the Fall River County Jail. Hughes alleges that he was raped by his cellmate in the jail on three successive days, September 9, 10, and 11, 1982. Hughes further alleges that he informed the jailer of the rapes upon each occurrence. The jailer, however, refused to move Hughes or otherwise provide adequate protection for Hughes from his cellmate's attacks, according to the complaint.

Hughes commenced this action in January 1986, over three years after the rapes. The defendants moved for summary judgment on statute-of-limitations grounds, arguing that either S.D.C.L. §15-2-15.2, which purports to establish a two-year statute of limitations for claims under the federal civil-rights statutes, or S.D.C.L. §15-2-14, which establishes a three-year limitations period for personal-injury claims, applied and barred the suit.[1] The District Court, noting that *Wilson v. Garcia*, 471 U.S. 261 (1985), establishes that the statute of limitations for §1983 actions is the state statute of limitations for personal-injury actions, ruled that the three-year statute applied, and that Hughes's action was barred unless the running of this statute had been tolled.

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[1] Effective July 1, 1986, S.D.C.L. §15-2-15.2 was amended to provide a three-year period for federal civil-rights actions, the same period that governs personal-injury actions under §15-2-14. However, this amendment was, by its terms, only prospective, and so has no application to Hughes's claim.

Hughes asserted that his imprisonment had tolled the running of the statute by virtue of S.D.C.L. §15-2-22(3). This statute provides that if a person entitled to bring an action is, at the time the cause of action accrues, imprisoned on a criminal charge or in execution of a sentence of a criminal court for a term less than life, the period of this disability is not part of the time limited for commencing the action, except that the period cannot be extended more than five years in all, or longer than one year after the disability ceases. Section 15-2-22 further provides, however, that the provisions of subdivision 15-2-22(3) "do not apply to federal civil rights cases."[2] Hughes maintained that this exclusion of federal civil-rights claims was not consistent with federal law, and therefore should not be applied to prevent tolling of the statute of limitations on his claim. The District Court disagreed, applied the state rule excluding federal civil-rights claims from the effect of its tolling statute, and held Hughes's action barred by the statute of limitations.

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[2]S.D.C.L. §15-2-22 states in full:

> If a person entitled to bring an action other than for the recovery of real property, except for a penalty or forfeiture or against a Sheriff or other officer for an escape, be at the time the cause of action accrued, either:
>
> (1) Within the age of minority as defined in Chapter 26-1;
>
> (2) Mentally ill; or
>
> (3) Imprisoned on a criminal charge; or in the execution of a sentence of a criminal court for a term less than his natural life; the time of such disability is not part of the time limited for the commencement of the action.
>
> The period within which the action must be brought cannot be extended more than five years by any such disability except infancy, nor can it be extended in any case longer than one year after the disability ceases.
>
> The provisions of this section shall not apply to actions for the foreclosure of any real estate mortgage, by action or by advertisement.
>
> The provisions of subdivision (3) do not apply to federal civil rights cases.

II.

Congress did not establish any specific statute of limitations or body of tolling rules for actions brought under the Reconstruction Civil Rights Acts. In such circumstances, "the settled practice has been to adopt a local time limitation as federal law *if it is not inconsistent with federal law or policy to do so.*" *Wilson*, 471 U.S. at 266-67 (emphasis added); see *Board of Regents v. Tomanio*, 446 U.S. 478, 483-84 (1980). Congress has endorsed this practice for claims under the Reconstruction Civil Rights Acts, providing in 42 U.S.C. §1988 that where no suitable federal rule exists, rules of decision for such claims should be derived by incorporating the law of the forum state, "so far as [the state's law] is not inconsistent with the Constitution and laws of the United States." See *Wilson*, 471 U.S. at 267; *Burnett v. Grattan*, 468 U.S. 42, 47-48 (1984). State statutes of limitations and tolling laws are inconsistent with federal law, and therefore not properly borrowed to govern federal claims, if they are inconsistent with the policies underlying the federal cause of action at issue, *Burnett*, 468 U.S. at 52-55; *Johnson v. Railway Express Agency, Inc.*, 421 U.S. 454, 465 (1975), or, more important in the present case, if they express hostility towards or discriminate against federal rights. *Wilson*, 471 U.S. at 276; *Johnson v. Davis*, 582 F.2d 1316, 1318-19 (4th Cir. 1978).

Thus, in *Republic Pictures Corp. v. Kappler*, 151 F.2d 543 (8th Cir. 1945), *aff'd per curiam without opinion*, 327 U.S. 757 (1946), a case brought under the Fair Labor Standards Act, 29 U.S.C. §201, *et seq.*, this Court refused to apply an Iowa statute that prescribed a six-month statute of limitations for federal statutory claims, while a five- or ten-year limitations period governed analogous contract claims under Iowa law. We stated:

> A state may not discriminate against rights accruing under federal laws. *McKnett v. St. Louis & S.F.R. Co.*, 292 U.S. 230 [(1934)]; *Pufahl v. Estate of Parks*, 299 U.S. 217 [(1936)] . . . .

> . . . [Plaintiff's] claim or cause of action is discriminated against solely because it arises under a federal statute. This discriminatory treatment . . . in effect makes inferior congressional enactments and rights which under our jurisprudence are intended to be paramount and supreme . . . .
>
> Here, the state has singled out federal claims ... as such and has prescribed a shorter period of limitations for the bringing of such actions than that prescribed for the bringing of similar actions arising or based upon other than federal laws. The statute violated Article 6 of the Constitution ... [and] would result in denying to those seeking to assert such claims, the equal protection of the law. 14th Amendment, Constitution, Sec. 1 . . . . (citations omitted).

151 F.2d at 546-47.[3]

S.D.C.L. §15-2-22 works a similar discrimination against federal rights. Had Hughes brought suit under South Dakota tort law for precisely the same occurrences and actions that are the subject of his 42 U.S.C. §1983 claim, he would have had the benefit of the tolling effects of §15-2-22. However, solely because he has sued under a federal civil-rights statute, §15-2-22 would not toll the statute on Hughes's action. South Dakota has singled out federal claims, subjecting them to more restrictive tolling provisions than those governing analogous state-law claims. Section 15-2-22's exclusion of federal civil-rights claims from the tolling effects of §15-2-22(3) is thus inconsistent with federal law, and should not be incorporated to govern federal civil-rights claims.

Chambers v. Omaha Public School District, 536 F.2d 222, 228 (8th Cir. 1976), cited by the defendants, is not contrary to our decision here. *Chambers* involved racial discrimination and First

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[3] The Supreme Court's per curiam affirmance simply cites to certain pages of three earlier cases. 327 U.S. 757, citing *McKnett*, 292 U.S. at 234; *Pufahl*, 299 U.S. at 227; and *Miles v. Illinois C.R. Co.*, 315 U.S. 698, 704 (1942). The content of the passages cited makes clear the Supreme Court's approval of our anti-discrimination rationale. *Matthewman v. Akahane*, 574 F. Supp. 1510, 1518-19 (D. Haw. 1983).

Amendment claims under 42 U.S.C. §1983. In *Chambers*, which was decided some years before the Supreme Court made clear in *Wilson* that, generally, all §1983 actions were to be governed by state statutes of limitations for personal-injury claims, we found no Nebraska causes of action that were analogous to the claims at issue, and therefore approved the application of a Nebraska statute that provided for a three-year statute of limitations for federal statutory claims. In so holding we expressly noted that since the plaintiffs had identified no analogous state-law claims, necessarily no analogous state claims had been given preferential treatment. 536 F.2d at 228-30. See *Mattheuman v. Akahane*, 574 F. Supp. at 1520-21 & n.20. Here, in contrast, South Dakota has clearly given preferential treatment to analogous state-law claims.

The defendants point out that the rule tolling the statute of limitations during imprisonment stems from the common-law doctrine that a prisoner is *civiliter mortuus* (civilly dead) and therefore unable to sue. See *Hawthorne v. Wells*, 761 F.2d 1514, 1515 (11th Cir. 1985). The defendants further observe that this common-law doctrine no longer holds sway, and that prisoners may and frequently do sue. They conclude that it is therefore not necessary that there be any tolling provision for imprisonment. However, this does not rectify the shortcomings of S.D.C.L. §15-2-22. That it is permissible for there to be no tolling provision does not mean that a state may provide tolling for state claims but refuse to do so for analogous federal claims and have this discrimination against federal claims incorporated as federal law.

The defendants also point out that the Court in *Hawthorne*, *supra*, refused to incorporate a Georgia tolling provision for imprisonment to govern federal civil-rights claims because it was inconsistent with federal policies. 761 F.2d at 1517. See also *Campbell v. Guy*, 520 F. Supp. 53 (E.D. Mich. 1981), *aff'd*, 771 F.2d 1055 (6th Cir. 1983), *cert. denied*, 464 U.S. 1051 (1984). The tolling provisions in *Hawthorne* and *Campbell* would have tolled the statute of limitations for the entire duration of the prisoner's incarceration, a period that could be measured in decades. The

courts concluded that, at least where prisoners were not actually disabled from bringing lawsuits, tolling statutes that permit claims to lie dormant for such long periods are inconsistent with federal policies of repose, see *Tomanio*, 446 U.S. at 488; *Wilson*, 471 U.S. at 271, and with policies of deterrence underlying federal civil rights laws. *Hawthorne*, 761 F.2d at 1717; *Campbell*, 520 F. Supp. at 55-56. The South Dakota tolling provision, however, avoids this problem by limiting the total tolling period to a maximum of five years; thus, a §1983 claim would in any case have to be brought within eight years of accrual, and this period is not so long as to render the provision inconsistent with federal policies of repose.

The defendants have also made a number of other arguments, none of which we consider substantial. We express our gratitude to appellant's court-appointed counsel for his services.

III.

We therefore conclude that Hughes was entitled to have the statute of limitations on his claim tolled under S.D.C.L. §15-2-22, and reverse the District Court's grant of summary judgment to the defendants. The case is remanded for further proceedings consistent with this opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

FILED
June 26, 1986
WILLIAM F. CLAYTON, clerk

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CIV. 86-5021

STANLEY HUGHES,

Plaintiff,

vs.

SHERIFF FALL RIVER COUNTY JAIL
and JEFF TARELL - JAILER FALL RIVER COUNTY JAIL

Defendants.

MEMORANDUM OPINION AND ORDER

Plaintiff commenced this action in January 1986 alleging violations of his civil rights under 42 U.S.C. § 1983. The substance of Plaintiff's allegations are that he was raped by his cellmate while a prisoner at the Fall River County Jail on September 9, 10, and 11, 1982. Plaintiff claims that he informed the jailer of the circumstances of the rapes upon each occurrence, but the jailer refused to believe Plaintiff and provide adequate protection for him from the attacks of his cellmate. Plaintiff further alleges that the jailer continued to incarcerate him in the same cell with the rapist despite Plaintiff's pleas to be moved. Plaintiff claims that as a result of the attacks he became diseased with venereal warts and has been permanently damaged in the amount of $5 million.

Defendants have moved for summary judgment on the sole issue of the statute of limitations. For the reasons stated herein, Defendants' Motion for Summary Judgment is granted.

Defendants urge the Court to apply either of two statutes of limitations to bar Plaintiff's case. The first, SDCL 15-2-15.2, reads as follows:

> An action brought under the federal civil rights statutes may be commenced only within two years after the alleged constitutional deprivation has occurred. This section is prospective in application.

The second statute of limitations urged by Defendants is SDCL 15-2-14, which provides that an action for personal injury must be brought within three years after the cause of action arose.

> Except where, in special cases, a different limitation is prescribed by statute, the following civil actions other than for the recovery of real property can be commenced only within three years after the cause of action shall have accrued: ...
>
> (3) an action for personal injury.

The United States Supreme Court has decreed that the applicable statute of limitations in § 1983 actions is the analogous state statute of limitations for personal injury actions. *See Wilson v. Garcia*, ____ U.S. ____, 105 S. Ct. 1938, ___ L. Ed. 2d ____ (1985). Application of the three-year personal injury statute of limitations to Plaintiff's case renders his action time-barred unless the running of the statute of limitations has been tolled.

Congress did not establish a statute of limitations or a body of tolling rules applicable to actions brought in federal court under § 1983. *Board of Regents of the University of the State of New York v. Tomanio*, 446 U.S. 478, ____, 100 S. Ct. 1790, 1795, 64 L. Ed. 2d 440, __ (1980). In 42 U.S.C. § 1988, Congress quite clearly instructs federal courts to refer to state statutes when federal law provides no rule of decision for actions brought under § 1983. *Id.* at 1795. Because there is no relevant federal rule for tolling of the running of the statute of limitations, this Court should "borrow" the applicable state law tolling provision unless it is incon-

sistent with the Constitution and laws of the United States. *Id.* The length of the limitations period, and the closely related questions of tolling and application are to be governed by state law. *Wilson v. Garcia*, *supra* at 1943.

The relevant tolling statute in South Dakota is SDCL 15-2-22(3). It provides that if a person entitled to bring an action be at the time the cause of action accrued imprisoned on a criminal charge; or in execution under the sentence of a criminal court for a term less than his natural life; the term of such disability is not a part of the time limited for the commencement of the action. SDCL 15-2-22 further provides that the provisions of subdivision (3) do not apply to federal civil rights cases. Thus under the state law tolling provision applicable to this federal civil rights case, the running of the statute of limitations is not tolled and Plaintiff's action is time-barred by virtue of the running of the statute of limitations.

Plaintiff argues that the Court should not apply the South Dakota tolling provisions in SDCL 15-2-22 because the statute is inconsistent with federal law in that the statute discriminates between civil rights claims and all other claims (such as negligence) by prohibiting application of the tolling provision to civil rights claims. The Court finds no inconsistency between the South Dakota tolling provision and the United States Constitution and laws. In determining whether state law was inconsistent with federal law, the United States Supreme Court stated in *Robertson v. Wegemann*, 436 U.S. 584, 593, 98 S. Ct. 1991, 1996-97 (1978):

> The state statute cannot be considered "inconsistent" with federal law merely because the statute causes the plaintiff to lose the litigation. If success of the §1983 action were the only benchmark, there would be no reason at all to look to state law, for the appropriate rule would then always be the one favoring the plaintiff, and its source would be essentially irrelevant. But §1988 quite clearly instructs us to refer to

> state statutes; it does not say that state law is to be accepted or rejected based solely on which side is advantaged thereby.

SDCL 15-2-22 is not inconsistent with the laws of the United States when there is no federal provision for tolling of the statute of limitations with which SDCL 15-2-22 could be inconsistent.

In conclusion, the Court is bound to apply state rules for tolling of the statute of limitations in § 1983 actions unless the state rule is inconsistent with the Constitution and laws of the United States. The Court finds no inconsistency between the statute of limitations and tolling provisions of state law and applies the same to the instant action. Plaintiff's action was commenced after the applicable statute of limitations had run and no tolling provision saves the action. No issues of material fact remain and Defendants are entitled to judgment as a matter of law. This opinion constitutes the Court's findings of fact and conclusions of law. Based upon the foregoing, it is therefore

ORDERED that Defendants' Motion for Summary Judgment is granted and the case is dismissed.

Dated this 26th day of June, 1986.

BY THE COURT:

/s/ RICHARD H. BATTEY

RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE

ATTEST:

WILLIAM F. CLAYTON, Clerk

By /s/ ALICE R. RAESLY
Deputy

(SEAL)

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

JUDGMENT

No. 86-5296SD

STANLEY L. HUGHES,

Appellant,

v.

SHERIFF OF FALL RIVER COUNTY JAIL, ET AL.,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

This appeal from the United States District Court was submitted on the record of the said district court, briefs of the parties and was argued by counsel.

Upon consideration of the premises, it is hereby adjudged and decreed that the judgment of the district court is reversed and remanded for further proceedings consistent with the opinion of this Court.

March 24, 1987

A true copy:
ATTEST: /s/ Robert D. St. Vrain
CLERK, U.S. COURT OF APPEALS, 8TH CIRCUIT.

MANDATE ISSUED: APRIL 15, 1987

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

STANLEY L. HUGHES,
Plaintiff and Appellant,

v.

SHERIFF, FALL RIVER COUNTY JAIL and
JEFF TARELL - JAILER OF FALL RIVER COUNTY JAIL,
Defendants and Appellees.

No. 86-5296-SD

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Sheriff, Fall River County Jail and Jeff Tarell - Jailer of Fall River County Jail, the Appellees above named, hereby appeal to the Supreme Court of the United States from the Judgment of the United States Court of Appeals for the Eighth Circuit dated March 24, 1987, reversing the summary judgment for Appellees entered by the United States District Court for the District of South Dakota on June 26, 1986.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

Dated this 8th day of June, 1987.

DAVENPORT, EVANS, HURWITZ & SMITH

/s/ Ellsworth E. Evans
Ellsworth E. Evans

/s/ Michael J. Schaffer
Michael J. Schaffer
513 South Main Avenue
P.O. Box 1030
Sioux Falls, SD 57101-1030
(605) 336-2880
Attorneys for
Appellants-Defendants